

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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DIAMOND X RANCH LLC,,

Plaintiff,

v.

ATLANTIC RICHFIELD COMPANY,

Defendants.

Case No. 3:13-cv-00570-MMD-WGC

ORDER

(Motions to Dismiss - ECF Nos. 144, 182)

**I. SUMMARY**

This case arises from the alleged contamination of Plaintiff Diamond X Ranch LLC's ("Diamond X") property by drainage from the Leviathan Mine in Alpine County, California ("the Mine"). Defendant Atlantic Richfield Company ("ARCO") asserts counterclaims and third-party claims. Before the Court are Diamond X's motion to dismiss ("Diamond X's Motion") and Third-Party Defendant Park Livestock Company's motion to dismiss ("PLC's Motion"). (ECF Nos. 144, 182.) The Court has reviewed the briefs related to these motions and supplemental briefs related to Diamond X's Motion. (ECF Nos. 155, 160, 185, 193, 212, 215.) The Court also heard argument on July 18, 2016. For the reasons discussed below, the Motions are denied.

**II. BACKGROUND**

Diamond X owns more than 1700 acres of property in Douglas County, Nevada, and Alpine County, California ("the Property"). (ECF No. 175 at 7.) Plaintiff alleges that the Property has been contaminated by acid mine drainage ("AMD") flowing from the Mine. (*Id.* at 3-8.) Between 1953 and 1962, The Anaconda Company, Defendant's

1 wholly-owned subsidiary, owned and operated the Mine as an open-pit sulfur mine. (*Id.*  
2 at 3.) No entity has operated the Mine since 1962. (*Id.*)

3 In 1997, the United States Environmental Protection Agency (“EPA”) began to  
4 take action at the Mine under the Comprehensive Environmental Response,  
5 Compensation, and Liability Act (“CERCLA”). (*Id.* at 3-4.) The EPA listed the Mine on  
6 the National Priorities List in May 2000, and it identified ARCO and the State of  
7 California as potentially responsible parties (“PRPs”). (*Id.* at 4.) The EPA issued a  
8 Unilateral Administrative Order (“UAO”) against ARCO in November 2000 (“2000 UAO”)  
9 and a second UAO against ARCO in June 2008 (“2008 UAO”) (collectively “UAOs”).  
10 (ECF No. 144 at 3; ECF No. 146 at Exhs. 1 and 2.<sup>1</sup>) The UAOs again identified ARCO  
11 as a PRP and required ARCO to initiate a Remedial Investigation and Feasibility Study  
12 (“RI/FS”) of contamination from the Mine and to prepare and perform a RI/FS based on  
13 a Statement of Work (“SOW”). (ECF No. 144 at 4; ECF No. 146 at 5, 57.) The purposes  
14 of the UAOs were (1) to determine the nature and scope of contamination from the site  
15 and its threat to public health and the environment, and (2) to determine and evaluate  
16 alternatives to effectively remediate the contamination through a feasibility study (ECF  
17 No. 146 at 6, 58.) Under the SOW, ARCO was required to conduct a “phased”  
18 evaluation to determine the available remedial approaches and to then compile this  
19 information into a report. (*Id.* at 100.)

20 Plaintiff asserts that the open-pit mining and releases of AMD at the Mine has  
21 contaminated the Property as well as Bryant Creek,<sup>2</sup> a tributary downstream of the Mine  
22 which provides water for flood irrigation on the Property. (ECF No. 175 at 7-8.) Diamond  
23 X alleges that the release of hazardous substances from the Mine have caused it to  
24 incur response costs as defined under CERCLA section 9601(25). (*Id.* at 14.) Diamond

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25 <sup>1</sup> Diamond X requests the Court to take judicial notice of the UAOs and the  
26 Alpine Decree. (ECF No. 146.) PLC similarly asks the Court to take judicial notice of  
27 these documents along with a Special Use Application and Report. (ECF No. 184.) The  
Court grants both requests as these documents are matters of public record.

28 <sup>2</sup> Plaintiff is the only entity that has water rights on Bryant Creek. (ECF No. 119  
at 8.)

1 X asserts eight claims against ARCO, including a claim for recovery of its response  
 2 costs under CERCLA section 107(a), 42 U.S.C. § 9607(a) (“Section 107(a)” or “§  
 3 107(a)”). (*Id.*)

4 In response, ARCO asserts two counterclaims against Diamond X, which  
 5 function as third-party claims against PLC, under CERCLA sections 107(a) and  
 6 113(f)(1) (“Section 113(f)(1)” or “§ 113(f)(1)”). (ECF No. 179 at 26-29.) ARCO also  
 7 asserts a counterclaim/third-party claim against Diamond X and PLC for declaratory  
 8 relief under CERCLA section 113(g)(2) and 28 U.S.C. § 2201. (ECF No. 179 at 30.)  
 9 The gist of ARCO’s allegations are that Diamond X and PLC (collectively, “Third-Party  
 10 Defendants”) actively operated the irrigation system on the Property, including  
 11 determining “if, when, where and how much water containing hazardous substances  
 12 was placed and deposited on the Diamond X Property.” (*Id.* at 21.) ARCO further  
 13 alleges that the Third-Party Defendants undertook maintenance activities related to the  
 14 irrigation ditches “with the intent to dispose of the sediment and hazardous substances  
 15 on the Diamond X Property and on other properties.” (*Id.* at 22.)

16 Diamond X moves to dismiss ARCO’s first claim under Section 107(a) and third  
 17 claim for declaratory relief to the extent it is based on CERCLA section 113(g)(2).<sup>3</sup>  
 18 (ECF No. 144.) PLC also seeks dismissal of the third-party claims, contending that it is  
 19 not a covered party under CERCLA, and adopts the same arguments raised in Diamond  
 20 X’s Motion in the alternative. (ECF No. 182.)

### 21 **III. LEGAL STANDARD**

22 A court may dismiss a claim for “failure to state a claim upon which relief can be  
 23 granted.” Fed. R. Civ. P. 12(b)(6). “To survive a motion to dismiss, a complaint must  
 24 contain sufficient factual matter, accepted as true, to state a claim to relief that is  
 25 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic*

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26  
 27 <sup>3</sup> Diamond X and PLC also moved to strike the portion of the declaratory relief  
 28 claim that is based on CERCLA section 113(g)(2) if the Court grants their motions to  
 dismiss. (ECF Nos. 145, 183.) The Court denied these motions. (ECF No. 216.)

1 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In *Iqbal*, the Supreme Court clarified the  
 2 two-step approach that district courts are to apply when considering motions to dismiss.  
 3 First, a district court must accept as true all well-pleaded factual allegations in the  
 4 complaint; however, legal conclusions are not entitled to an assumption of truth. *Id.* at  
 5 678-79. Second, a district court must consider whether the factual allegations in the  
 6 complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when  
 7 the plaintiff's complaint alleges facts that allow a court to draw a reasonable inference  
 8 that the defendant is liable for the alleged misconduct. *Id.* at 663. Where the complaint  
 9 fails to "permit the court to infer more than the mere possibility of misconduct, the  
 10 complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at  
 11 679 (quoting Fed. R. Civ. P. 8(a)(2)) (alteration omitted). When the claims in a complaint  
 12 have not crossed the line from conceivable to plausible, the complaint must be  
 13 dismissed. *Twombly*, 550 U.S. at 570. A complaint must contain either direct or  
 14 inferential allegations concerning "all the material elements necessary to sustain  
 15 recovery under some viable legal theory." *Id.* at 562 (quoting *Car Carriers, Inc. v. Ford*  
 16 *Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

#### 17 **IV. DIAMOND X'S MOTION**

18 Diamond X argues that ARCO is barred from asserting a claim under Section  
 19 107(a) because of Diamond X's own Section 107(a) claim and because ARCO's  
 20 response costs were incurred pursuant to the EPA's administrative orders, which  
 21 amount to "civil actions."<sup>4</sup> (ECF No. 144 at 10.) The Court will address each argument in  
 22 turn.

##### 23 **A. ARCO's Section 107(a) Claim**

24 "CERCLA provides two mechanisms for private parties to recover their  
 25 environmental cleanup expenses from other parties." *Whittaker Corp. v. United States*  
 26 (*Whittaker II*), No. 14-55385, 2016 WL 3244838, at \*3 (9th Cir. June 13, 2016). First,

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27  
 28 <sup>4</sup> Diamond X further argues that if the Court dismisses ARCO's Section 107(a)  
 claim, the Court should dismiss ARCO's declaratory relief claim. (ECF No. 144 at 11.)

1 Section 107(a) provides for parties to bring “cost recovery” actions against “potentially  
2 responsible parties” to recover costs, including “any . . . necessary costs of response  
3 incurred by any other person consistent with the national contingency plan.” 42 U.S.C.  
4 § 9607(a); *Whittaker II*, 2016 WL 3244838, at \*3. Second, “[s]ection 113(f)(1) authorizes  
5 a contribution action to [PRPs] with common liability stemming from an action instituted  
6 under § 106 or § 107(a).” *United States v. Atlantic Research Corp.* (“*Atlantic II*”), 551  
7 U.S. 128, 129 (2007). Sections 107(a) and 113(f) “complement each other by providing  
8 causes of actions to persons in different procedural requirements.” *Id.* at 139 (internal  
9 quotation marks omitted). “A party uses contribution to get reimbursed for being made  
10 to pay more than its fair share to someone else, and uses cost recovery to get  
11 reimbursed for its own voluntary cleanup costs.” *Whittaker II*, 2016 WL 3244838, at \*4.  
12 Moreover, while PRPs can seek contribution under § 113(f)(1), they cannot  
13 simultaneously seek double recovery under § 107(a). *Atlantic II*, 551 U.S. at 139. “[A]  
14 party who *may* bring a contribution action for certain expenses *must* use the contribution  
15 action, even if a cost recovery action would otherwise be available.” *Whittaker II*, 2016  
16 WL 3244838, at \*4 (citing *Atlantic II*, 551 U.S. 128; *Kotrous v. Goss-Jewett Co. of N.*  
17 *Cal.*, 523 F.3d 924, 933 (9th Cir. 2008)).

18 Diamond X asserts a claim under § 107(a) to recover clean-up costs on the  
19 Property in response to hazardous waste released from the Mine.<sup>5</sup> (ECF No. 175 at 14.)  
20 Diamond X argues that ARCO’s remedy is limited to contribution under Section  
21 113(f)(1) and that ARCO cannot counterclaim under § 107(a). (ECF No. 175.) ARCO  
22 counters that it is seeking to recover separate costs under §§ 107(a) and 113(f), such  
23 that counterclaiming under both sections is proper. (ECF No. 179.)

24 Diamond X relies primarily on *Whittaker Corp. v. United States (Whittaker I)*, No.  
25 CV 13-1741 FMO, 2014 WL 631113 (C.D. Cal. Feb. 10, 2014) to argue that ARCO

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26  
27 <sup>5</sup> Diamond X also alleges a claim for declaratory relief under Section 113(g)(2)  
28 seeking to ensure ARCO pays for Diamond X’s future remediation costs. (ECF No. 175  
at 13.)

1 could only bring a § 113(f)(1) counterclaim. In June, the Ninth Circuit reversed *Whittaker*  
2 *I*, finding that Whittaker could bring a claim under § 107(a). See *Whittaker II*, 2016 WL  
3 3244838. The parties disagree as to the import of *Whittaker II* on ARCO's § 107(a)  
4 claim. The Court agrees with ARCO on this matter.

5 In *Whittaker II*, the Ninth Circuit addressed the issue of whether Whittaker was  
6 limited to a contribution action against other polluters or whether instead Whittaker  
7 could seek a cost recovery action under § 107(a). Whittaker settled prior claims that  
8 Castaic Lake Water Agency ("Castaic Lake") had asserted under CERCLA in 2007. See  
9 *Whittaker II*, 2016 WL 3244838, at \*2. In the settlement, Whittaker reimbursed Castaic  
10 Lake for the costs to remove perchlorate pollution from its water well sites and for  
11 purchased water costs. *Id.* at 2. The agreement settled costs between Whittaker and  
12 Castaic Lake, but it did not require Whittaker to clean up the source of the  
13 contamination at the Bermite Site. *Id.* In 2013, Whittaker sued the United States to  
14 recover expenses associated with remediating the Bermite Site under § 107. *Id.* In  
15 *Whittaker I*, the district court dismissed Whittaker's § 107(a) claim, holding that  
16 Whittaker's claim needed to be brought under § 113(f)(1). See *Whittaker I*, 2014 WL  
17 631113, at \*11.

18 The Ninth Circuit reversed, reasoning that Whittaker was now seeking to recover  
19 "a different set of expenses [ ] for which Whittaker was not found liable" under the  
20 settlement agreement with Castaic Lake. See *Whittaker II*, 2016 WL 3244838, at \*8.  
21 The court rejected the government's argument that a party who has been sued in a §  
22 107 cost recovery action for expenses related to pollution at a site should be limited to a  
23 contribution action for all of their expenses at that site. *Id.* Thus, the court held that  
24 Whittaker was not required to bring a claim for contribution under §113(f)(1) against the  
25 government because it is seeking § 107(a) claim "to recover expenses that are separate  
26 from those for which Whittaker's liability is established or pending." *Id.* at \*9.

27 Similarly here, ARCO alleges that its counterclaim seeks to recover costs that  
28 are separate from those that Diamond X seeks to recover in its § 107(a) claim. ARCO's

operative pleadings allege as follows with respect to its § 107(a) claim:

45. Atlantic Richfield has incurred, and will continue to incur in the future, necessary response costs to, among other things, investigate, evaluate, and remediate the contamination allegedly associated with the Leviathan Mine site, including the Diamond X Property, in a manner consistent with the NCP, 40 C.F.R. Part 300 *et seq.*

46. Diamond X and Park Livestock are liable to Atlantic Richfield under CERCLA section 107(a), 42 U.S.C. § 9607(a), for response costs incurred by Atlantic Richfield in connection with the Diamond X Property.

47. Atlantic Richfield has not otherwise brought, or been sued in, a civil action under CERCLA sections 106 or 107(a) for the response costs it has incurred or will incur in connection with the Diamond X Property.

(ECF No. 179 at 28.) ARCO contends, and Third-Party Defendants do not dispute, that ARCO's § 107(a) claim seeks to recover (1) costs outside of Diamond X's claim, (2) costs from other parties (i.e., PLC), (3) costs ARCO "has itself incurred," and (4) costs incurred under the UAOs related to the Property. (ECF No. 155 at 7.)

"Not all of a party's expenses related to remediating a site fall within the scope of contribution." *Whittaker II*, 2016 WL 3244838, at \*5. Accepting ARCO's allegations as true, which the Court must under Rule 12(b)(6), ARCO has incurred expenses that are outside the scope of contribution and the scope of Diamond X's Section 107(a) claim for which liability has not been established. ARCO is therefore not barred from seeking cost recovery under Section 107(a).

## **B. The EPA's Orders**

Under CERCLA, PRPs can seek contribution from any other person "who is liable or potentially liable under [§ 107(a)] of this title, *during or following any civil action under [§ 106]* of this title or under [§ 107(a)] of this title." 42 U.S.C. § 9613(f)(1) (emphasis added). Diamond X reasons that because the UAOs amount to a "civil action," ARCO's procedural circumstances preclude it from asserting a claim under

1 Section 107(a). Diamond X relies primarily on *U.S. v. Atlantic Research Corporation*  
2 (*Atlantic II*), 551 U.S. 128, and *PCS Nitrogen, Inc. v. Ross Development Corporation*,  
3 104 F.Supp.3d 729 D.S.C. 2015). (ECF No. 144 at 9-10.) ARCO responds that  
4 Diamond X's argument is not supported by the majority of courts who have considered  
5 this issue. (ECF No. 155 at 10-11.)

6 As an initial matter, the Court disagrees with Diamond X's interpretation of  
7 *Atlantic II*, which Diamond X relies upon to argue that "enforcement actions," such as  
8 UAOs, are civil actions. (ECF No. 144 at 9; ECF No. 160 at 7-8.) Diamond X cites to the  
9 Supreme Court holding that PRPs who "have been subject to §§ 106 or 107  
10 *enforcement actions* are still required to use § 113, thereby ensuring its continued  
11 vitality." See *Atlantic II*, 551 U.S. at 134 (quoting *Atlantic Research Corp. v. United*  
12 *States* ("*Atlantic I*"), 459 F.3d 827, 836-37 (8th Cir. 2006)) (emphasis added). Although  
13 Diamond X notes the conflicting interpretations of this statement, it asserts this is  
14 persuasive authority regarding whether the EPA's UAOs amount to a "civil action"  
15 pursuant to § 113(f)(1). (ECF No. 160 at 7 n. 5.) While the quoted statement appears to  
16 include UAOs as "civil actions" under § 113(f)(1), this conclusion ignores the case's  
17 procedural posture. In that case, Atlantic Research had "commenced suit [against the  
18 United States] before, rather than during or following, a CERCLA enforcement action."  
19 *Atlantic I*, 459 F.3d at 835 (internal quotation marks omitted). Atlantic Research thus  
20 could not bring a § 113(f) action but instead had to rely on a § 107 claim to recover its  
21 cleanup costs. *Id.* In this context, "enforcement action" appears synonymous with  
22 CERCLA claims under §§ 106 or 107 because the court was not evaluating a previous  
23 administrative order or action. Since Atlantic Research sued the United States prior to  
24 any CERCLA enforcement action, the case never addressed what constitutes a §  
25 106(a) civil action.

26 Diamond X relies on *PCS Nitrogen* as well, but that case reflects the minority  
27 view that a UAO is equivalent to a "civil action" under § 113(f)(1). See *PCS Nitrogen*,  
28 104 F. Supp. 3d at 742 (stating that "at least one district court, however, considered a

1 UAO to be a civil action under § 113(f)(1)).<sup>6</sup> In contrast, the majority of courts have held  
 2 that UAOs under § 106(a) do not constitute a “civil action” for the purposes of §  
 3 113(f)(1). See *Emhart Industries, Inc. v. New Eng. Container Co., Inc.*, 478 F. Supp. 2d  
 4 199, 203 (D.R.I. 2007) (stating that the “court will follow the majority of courts in  
 5 concluding that § 113(f)(1) is unavailable for parties who are merely subject to  
 6 administrative orders, as opposed to final consent decrees, judgments, or  
 7 apportionments of liability”) (internal quotation marks omitted); *Raytheon Aircraft Co. v.*  
 8 *United States*, 435 F. Supp. 2d 1136, 1142 (D. Kan. 2006) (holding that a UAO pursuant  
 9 to § 106 was not a “civil action” for the purposes of a § 113(f)(1) claim for contribution);  
 10 *Blue Tee Corp. v. ASARCO, Inc.*, No. 03-5011-CV-SW-F-JG, 2005 WL 1532955, at \*4-5  
 11 (W.D. Mo. June 27, 2005) (dismissing a § 113(f)(1) contribution claim because a UAO  
 12 was not a “civil action” under §§ 106 or 107); *United States v. Taylor*, 909 F. Supp. 355,  
 13 365 (M.D.N.C. 1995) (stating a PRP which conducts remediation cannot bring a  
 14 contribution action when it has been “subjected to a [§] 106 administrative order”); *In re*  
 15 *FV Steel & Wire Co.*, 331 B.R. 385 (Bankr. E.D. Wis. 2005) (finding administrative  
 16 orders do not qualify as a “civil action” under CERCLA); *Pharmacia Corp. v. Clayton*  
 17 *Chemical Acquisition LLC*, 382 F. Supp. 2d 1079, 1088-89 (S.D. Ill. 2005) (holding  
 18 neither a UAO nor an Administrative Order by Consent (“AOC”) qualified as a “civil  
 19 action” under § 113(f)(1)). The Court agrees with these courts.

20 For civil actions in the Ninth Circuit, a final judgement “ends the litigation on the  
 21 merits and leaves nothing for the court to do but execute the judgement.” *Williamson v.*  
 22 *UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir. 1998) (citations and internal  
 23 quotation marks omitted). However, the UAOs at issue here do not share the same  
 24 characteristics as a “civil action” in terms of scope, finality, and opportunity to appeal.

25 Several aspects of the UAOs suggest that they lack the scope and finality of a

26 \_\_\_\_\_  
 27 <sup>6</sup> The *PCS Nitrogen* court appears to only briefly discuss this issue in concluding  
 28 that “PCS has nonetheless met one of the statutory triggers for a § 113(f)(1) claim  
 because it brings the instant action following a civil action under § 107(a)[.]” *PCS*  
*Nitrogen*, 104 F. Supp. 3d at 743.

1 “civil action.” The UAOs’ phased RI/FS study, requiring ongoing evaluations by the EPA  
2 and ARCO to determine the final remediation plan, does not have the same definitive  
3 scope or finality as a judgment in a “civil action.” While the EPA would eventually use  
4 the RI/FS report to determine the extent of ARCO’s remediation work, this process  
5 appears more incremental and less finalized than a “civil action.” The EPA’s explicit  
6 reservation of right in the UAOs to bring action against ARCO pursuant to § 107 for  
7 additional response costs, or to require ARCO to conduct additional cleanup under §  
8 106, suggests that the UAOs cannot be considered a final judgment. (See ECF No. 146  
9 at 83.) The 2008 UAO was filed after ARCO apparently failed to comply with the 2000  
10 UAO, further suggesting that a UAO does not have the finality of a “civil action.” Under  
11 the 2008 UAO, the EPA provided that they could unilaterally carry out the order or seek  
12 judicial enforcement of the order under § 106, which further shows that the UAOs do not  
13 share the characteristic of finality found in “civil actions.” (*Id.* at 84.) Since the UAOs did  
14 not settle ARCO’s liability with respect to the site or determine a final course of action  
15 for the cleanup, the UAOs cannot be considered to have the same preclusive effect as a  
16 judgment in a “civil action.” Thus, the UAOs do not appear to have the same scope or  
17 finality as a “civil action.”

18 The UAOs do not provide the same appellate rights commensurate with a “civil  
19 action.” The 2000 UAO gave ARCO an opportunity to confer with the EPA within 10  
20 days of signing the order. (*Id.* at 85.) But it required that “[t]he purpose and scope of the  
21 conference shall be limited to issues involving the implementation of the response  
22 actions required by this Order and the extent to which [ARCO] intends to comply with  
23 this Order.” (*Id.*) This conference was not a proceeding that allowed ARCO to present  
24 evidence to challenge the order. (*Id.*) And ARCO was prohibited from seeking review of  
25 the order or resolution of its potential liability. (*Id.*) ARCO was also given 20 days from  
26 the effective date of the order to give the EPA written notice of its compliance. (*Id.* at  
27 70.) While ARCO had the opportunity to present facts and defenses under §§ 106(b)  
28 and 107(c)(3) during this time, after the deadline passed ARCO had to unequivocally

1 commit to perform the order or be considered in violation of the UAO. (*Id.*) These limited  
2 opportunities to contest the UAOs can hardly be considered appeals analogous to those  
3 available for “civil actions.” See Fed. R. App. P. 3. As a result, ARCO had no meaningful  
4 way to present defenses that would either modify the UAOs or absolve ARCO of  
5 liability, which are procedural measures that would be available to a defendant in a “civil  
6 action.”

7 In addition, the trigger for the three-year statute of limitations as applied to §  
8 113(f)(1) claims counsels against finding a UAO to equate to a “civil action.” Section  
9 113(g)(3) provides that the statute of limitations for contribution actions begin at the date  
10 of “judgment” and the date of “settlement.” *Cooper Indus., Inc. v. Aviall Services,*  
11 *Inc.*, 543 U.S. 157, 158-59 (2004). As the Supreme Court observed in *Cooper*  
12 *Industries*, “[N]otably absent from § 113(g)(3) is any provision for starting the limitations  
13 period if a judgment or settlement never occurs, as is the case with a purely voluntary  
14 cleanup[,]” or, plausibly, administrative orders. See *id.* at 167. This observation lends  
15 support to a finding that a § 113(f)(1) claim is prohibited absent a lawsuit or settlement  
16 under §§ 106 or 107. See *Blue Tee*, 2005 WL 1532955, at \*4 (“ . . . it is clear a party  
17 can pursue contribution under § 113(f)(1) only after being sued in a § 106 or § 107 civil  
18 action . . . ”); see also *Am. Premier Underwriters Inc. v. Gen. Elec. Co.*, 866 F. Supp. 2d  
19 883, 905 (S.D. Ohio 2012) (“[T]he Court concludes that the 1996 UAO did not trigger  
20 the statute of limitations for [the plaintiff’s] contribution claim.”).

21 Finally, the ongoing nature of a UAO reveals a reason for having § 113(g)(3) start  
22 the statute of limitations at the date of “judgment” or “settlement” instead of the effective  
23 date of the order. See *Cooper Indus.*, 543 U.S. at 158-59; see, e.g., *Am. Premier*  
24 *Underwriters*, 866 F. Supp. 2d at 905; *Taylor*, 909 F. Supp. at 365 (stating that a party  
25 busy incurring additional cleanup costs needs a longer statute of limitations for its  
26 recovery action than a party seeking a contribution claim to recuperate its fixed costs).

27 In sum, the Court finds that the EPA’s administrative orders such as the UAOs  
28 are not “civil actions” under § 106(a).

**V. PLC'S MOTION**

"The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." *United States v. Bestfoods*, 524 U.S. 51, 56 n. 1 (1998) (quoting *Pennsylvania v. Union Gas*, 491 U.S. 1, 20 (1989)). Potentially responsible parties under CERCLA fall into "four classes of persons": current owner or operator; former owner or operator; arranger; and transporter. *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340-41 (9th Cir. 1992); 42 U.S.C. § 9607(a).<sup>7</sup> "[L]iability attaches . . . because . . . their actions contribute to the release of contaminated material and increase the cost of remedial action." *Id.* at 1343.

ARCO alleges that PLC falls within the latter three categories of PRPs—former operator, arranger and transporter—based on its operation of the flood irrigation system and its maintenance of the irrigation ditches on the Property. (See ECF No. 179 at 21-22, 29.) PLC contends that ARCO fails to allege sufficient facts to establish that PLC is a PRP, including that there was no "disposal" within the meaning of CERCLA.<sup>8</sup> (ECF No. 182 at 6.) In the alternative, PLC adopts Diamond X's arguments that ARCO's relief

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<sup>7</sup> Section 9607(a) defines the four classes, in pertinent part, as follows:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.

<sup>8</sup> ARCO does not allege that PLC falls within the first class of PRP.

1 is limited to contribution under Section 113(f)(1). (*Id.* at 7.) Because the Court finds that  
 2 ARCO has alleged sufficient facts to establish PLC's liability as a former operator, the  
 3 Court will not address the other two categories of PRPs.

4 Former operators are "any person who at the time of disposal of any hazardous  
 5 substance owned or operated any facility at which such hazardous substances were  
 6 disposed of[.]" 42 U.S.C. § 9607(a)(2). Finding this definition to be circular and  
 7 unhelpful, the Supreme Court clarified that "under CERCLA, an *operator* must manage,  
 8 direct, or conduct *operations specifically related to pollution*, that is, operations having to  
 9 do with the leakage or disposal of hazardous waste, or decisions about compliance with  
 10 environmental regulations." *Bestfoods*, 524 U.S. at 66-67 (emphasis added). The Court  
 11 found that CERCLA "must be read to contemplate 'operations' as including the exercise  
 12 of direction over the facility's activities." *Id.* at 71. This clarification followed the Ninth  
 13 Circuit's earlier definition of an operator as any party with the "authority to control the  
 14 cause of the contamination at the time the hazardous substances were released into the  
 15 environment." *Kaiser Aluminum*, 976 F.2d at 1341. The Ninth Circuit's "operator"  
 16 definition has been held to be consistent with *Bestfoods'* definition. See *City of Los*  
 17 *Angeles v. San Pedro Boat Works*, 635 F.3d 440, 451-52 (9th Cir. 2011); see also *City*  
 18 *of Moses Lake v. U.S.*, 458 F. Supp. 2d 1198, 1227 (E.D. Wash. 2006); *Nu-W. Min. Inc.*  
 19 *v. U.S.*, 768 F. Supp. 2d 1082, 1089 (D. Idaho 2011); *Wells Fargo Bank, N.A. v. Renz*,  
 20 795 F. Supp. 2d 898, 915-16 (N.D. Cal. 2011). Moreover, as the *City of Los Angeles*  
 21 court noted, "operator liability has been construed expansively in this circuit and others."  
 22 *City of Los Angeles*, 635 F.3d at 444 (internal quotation marks omitted). Accordingly, in  
 23 determining operator liability, courts evaluate (1) whether the operation is "specifically  
 24 related to pollution," and (2) whether the operator's activities are considered a  
 25 "disposal." See *City of Moses Lake*, 458 F. Supp. 2d 1198; *Roberts v. Heating*  
 26 *Specialist Inc.*, No. 3:12-CV-01820-SI, 2014 WL 3845877, at \*11 (D. Or. Aug. 5, 2014);  
 27 *Steadfast Ins. Co. v. United States*, No. CV 06-4686 AHM (RZx), 2009 WL 3785565, at  
 28 \*3 (C.D. Cal. Nov. 10, 2009).

1                   **1.       Operation Specifically Related to Pollution**

2           ARCO alleges that PLC's operation was specifically related to pollution because  
3 of PLC's operation of the flood irrigation system and maintenance of the irrigation  
4 ditches. (ECF No. 179 at 21-22.) In terms of the operation of the irrigation system,  
5 ARCO asserts that PLC operated and had the authority to operate the flood irrigation  
6 system on the Property allowing Bryant Creek waters to flow and be transported onto  
7 the Property by way of irrigation ditches. (ECF No. 179 at 21.) ARCO states that "in  
8 operating the irrigation system on the Diamond X Property, [PLC] determined if, when,  
9 where and how much water containing hazardous substances was placed and  
10 deposited on the Diamond X Property." (*Id.*) ARCO further alleges that PLC "had  
11 complete authority to control the placement, deposition, and disposal of water  
12 containing hazardous substances on the Diamond X Property, and exercised that  
13 authority through operation of the irrigation system." (ECF No. 179 at 21-22.) In terms of  
14 maintenance, the gist of ARCO's allegations is that PLC carried out maintenance  
15 activities involving "the removal of sediment containing hazardous substances from and  
16 around the irrigation ditches and movement to and placement, deposition, and  
17 discarding of the sediment and hazardous substances" that "resulted in the moving,  
18 spreading, and release or threatened release of hazardous substances" on the Property  
19 and surrounding properties. (*Id.* at 22.) According to ARCO, "Diamond X and [PLC]  
20 carried out these maintenance activities related to the irrigation ditches on the Diamond  
21 X Property and on other properties, with the intent to dispose of the sediment and  
22 hazardous substances on the Diamond X Property and on other properties." (*Id.*)

23           Accepting these allegations as true and construing "operator" "expansively," *City*  
24 *of Los Angeles*, 635 F.3d at 444, ARCO has sufficiently alleged facts to establish  
25 operator liability to satisfy *Kaiser Aluminum's* definition of "operator," assuming the flood  
26 irrigation system meets the disposal requirement under the statute.

27           In *Kaiser Aluminum*, the City of Richmond hired Ferry & Son to excavate and  
28 grade a portion of property that it had purchased from the defendant's predecessor for a

1 proposed housing development. 976 F.2d at 1339. Ferry & Son spread some of the  
2 displaced soil, which contained hazardous materials, over other parts of the property  
3 during its excavation activities. *Id.* at 1339-40. The defendant asserted a third-party  
4 complaint for contribution against Ferry & Son, alleging that “Ferry exacerbated the  
5 extent of the contamination by extracting the contaminated soil from the excavation site  
6 and spreading it over uncontaminated areas of the property.” *Id.* at 1340. The court  
7 found that these allegations were sufficient to show Ferry & Son had “control over this  
8 phase of the development” such that it was an “operator” within the meaning of section  
9 9607(a). *Id.* at 1342.

10 ARCO asserts similar allegations that PLC “determined if, when, where and how  
11 much water containing hazardous substances was placed and deposited” on the  
12 Property. (ECF No. 179 at 21.) According to ARCO, by its operations of the flood  
13 irrigation system, PLC “had complete authority to control the placement, deposition, and  
14 disposal of water containing hazardous substances” on the Property. (*Id.* at 21-22.)  
15 ARCO makes similar allegations about PLC’s role in carrying out maintenance activities  
16 involving the irrigation ditches that resulted in discarding of hazardous substances on  
17 the Property. (*Id.* at 22.) Accepting these allegations as true, ARCO has sufficiently  
18 alleged that PLC’s operations on the Property were “specifically related to pollution.”

19 PLC contends that the activities related to flood irrigation are associated with  
20 ranching, not managing or disposing of hazardous substances. (ECF No. 182 at 11.)  
21 Specifically, PLC refutes ARCO’s allegations that “opening the irrigation system  
22 headgates” and “periodic maintenance of the irrigation ditch” are operations related to  
23 hazardous waste disposal. (*Id.*) However, the same characterization may be ascribed to  
24 the activities in *Kaiser Aluminum*—Ferry & Son were excavating and grading for a  
25 proposed housing development, not managing disposal of hazardous substances.

26 PLC relies on *Redevelopment Agency of City of Stockton v. Burlington Northern*  
27 *and Santa Fe Ry. Corp.*, to argue that it does not qualify as an “operator” under  
28 CERCLA. *Redevelopment Agency of City of Stockton v. Burlington N. and Santa Fe*

Ry. Corp., CIV S05-02087 DFLJFM, 2007 WL 1793755 (E.D. Cal. June 19, 2007), *aff'd in part, rev'd in part sub nom. Redevelopment Agency of City of Stockton v. BNSF Ry. Co.*, 643 F.3d 668 (9th Cir. 2011).<sup>9</sup> In *Redevelopment Agency*, the State of California installed an underground perforated pipe, or “french drain,” to facilitate drainage near train tracks. *Id.* at \*1. Following the drain installation, the defendant railroads took over title to the property as well as operation and maintenance of the french drain. *Id.* Later, the railroads sold their interest to a redevelopment agency, which then discovered contamination at the drain from a nearby petroleum facility. *Id.* Contaminated water had flowed into the drain, polluting the soil around the drain and contaminating the property at the outlet of the drain. *Id.* The district court held that regardless of whether the railroads knew about or generally operated the french drain when the contamination occurred, the railroads were not “operators” under CERCLA. *Id.* at \*5. The district court relied on *Bestfoods* in finding that the railroads did not “‘manage, direct or conduct activities specifically related to pollution’ in connection with the french drain.” *Id.* (quoting *Bestfoods*, 524 U.S. at 66-67). The district court found that the “french drain never was intended to serve as a conduit for hazardous materials, nor . . . did the [r]ailroads [operate it] for a purpose related to pollution.” *Id.*

PLC asserts that, like the french drain, the flood irrigation ditches were not designed to be conduits for hazardous waste or used for operations “specifically related to pollution.” (ECF No. 193 at 5.) However, unlike the railroads, PLC’s role in the operation of the irrigation ditches was more active. As alleged, “in operating the irrigation system on the Diamond X Property, [PLC] determined if, when, where and how much water containing hazardous substances was placed and deposited on the Diamond X Property.” (ECF No. 179 at 21.) Moreover, ARCO also alleged that PLC’s maintenance activities involved “movement to and placement, deposition, and discarding of the sediment and hazardous substances” and were undertaken “with the

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<sup>9</sup> The district court’s decision that the railroads were not liable as “operators” was not an issue on appeal.

1 intent to dispose of the sediment and hazardous substances on the Diamond X Property  
2 and on other properties.” (ECF No. 179 at 22.)

3 As the *Kaiser Aluminum* court teaches, the court “begin[s] [its] analysis with the  
4 proposition that CERCLA ‘is to be given a broad interpretation to accomplish its  
5 remedial goals.’ 976 F.2d at 1343 (quoting *Stevens Creek Assoc. v. Barclays Bank of*  
6 *Cal.*, 915 F.2d 1355, 1363 (9th Cir. 1990)). Giving meaning to this “broad interpretation”  
7 and accepting ARCO’s allegations as true, PLC’s alleged management, operations and  
8 control of the flood irrigation system and irrigation ditches on the Property were  
9 “specifically related to pollution.”

## 10 **2. Disposal**

11 PLC asserts that whether flood irrigation amounts to a “disposal” under CERCLA  
12 is a matter of first impression and relies on the statute, case law, and exemptions to  
13 liability under CERCLA to argue that flood irrigation is not a “disposal.” ARCO counters  
14 that CERCLA defines “disposal” broadly to cover the activities alleged in its third-party  
15 complaint.

16 CERCLA borrows the definition of “disposal” from the Solid Waste Disposal Act.  
17 42 U.S.C. § 9601(29). “[D]isposal means the discharge, deposit, injection, dumping,  
18 spilling, leaking or placing of any solid waste or hazardous waste into or on any land or  
19 water so that such solid waste or hazardous waste or any constituent thereof may enter  
20 the environment. . .” 42 U.S.C. § 6903(3). “CERCLA’s definition of ‘disposal’ expressly  
21 encompasses the ‘placing of any . . . hazardous waste . . . on any land.’” *Kaiser*  
22 *Aluminum*, 976 F.2d at 1342 (quoting 42 U.S.C. § 6903(3)). This includes subsequent  
23 movement, dispersal, or release of hazardous substances during excavations. *Id.*  
24 (citations and quotation marks omitted). Generally, human activity that moves  
25 contaminants constitutes “disposal” under § 107(a)(2). See *Carson Harbor Village, Ltd.*  
26 *v. Unocal Corp.*, 270 F.3d 863, 876 (9th Cir. 2001) (*en banc*); *Kaiser Aluminum*, 976  
27 F.2d at 1342. But passive activities may also be considered to be disposal. See *Carson*  
28 *Harbor*, 270 F.3d at 876-77 (discussing that some courts permit “passive” activities to

1 constitute a “disposal” under CERCLA although it found “passive soil migration” to not fit  
 2 within CERCLA’s definition of “disposal”); *compare Pakootas v. Teck Cominco Metals,*  
 3 *Ltd.* No. 15-35228, 2016 WL 4011196, at \*6-8 (9th Cir. July 27, 2016) (finding that  
 4 deposition of airborne hazardous waste was not a “disposal” under CERCLA). In fact,  
 5 the Ninth Circuit rejected the “absolute binary” of the “active/passive distinction” and  
 6 clarifies that courts “must examine each of the terms in relation to the facts of the case  
 7 and determine whether the movement of contaminants is, under the plain meaning of  
 8 the terms, a “disposal.” *Carson Harbor*, 270 F.3d at 879 (internal quotation marks  
 9 omitted).

10 As alleged, PLC placed and deposited water containing hazardous substances  
 11 on the Property, removed sediment containing hazardous materials from the ditches,  
 12 and placed and discarded these materials on the Property, all of which resulted in the  
 13 release or threatened release of hazardous substances. (ECF No. 179 at 21-22.) PLC’s  
 14 operation of the flood irrigation system on the Property and maintenance of the irrigation  
 15 ditches as alleged fall within CERCLA’s definition of “disposal”: “placing of any . . .  
 16 hazardous waste . . . on any land or water . . .” 42 U.S.C. § 6903(3); *see Kaiser*  
 17 *Aluminum*, 976 F.2d at 1342. The activities are similar to the activities found to amount  
 18 to “disposal” in *Kaiser Aluminum*—moving displaced contaminated soil to portions of the  
 19 property that did not contain tainted soil. *Id.* The express language of the statute  
 20 compels a finding that ARCO has sufficiently alleged activities that meet the statutory  
 21 definition of “disposal.”

22 The cases that PLC relies upon support this finding. For example, PLC  
 23 analogizes this case to *Carson Harbor* for the proposition that flood irrigation is akin to  
 24 passive migration and not “disposal.” (ECF No. 182 at 15). However, *Carson Harbor*  
 25 involved passive migration of hazardous substances through the soil. *Carson Harbor*,  
 26 270 F.3d at 879. The court found that disposal is not limited to releases caused by  
 27 human conduct and may cover passive migration (although not passive soil migration)  
 28 occurring while the former owner possessed the property. *Id.* at 879-81. Here, ARCO

1 alleges that PLC knowingly diverted contaminated water from Bryant Creek and  
2 deposited the water through a man-made irrigation system onto the Property. (ECF No.  
3 179 at 21.) They also allege that PLC maintained the flood irrigation system by  
4 removing contaminated sediment from the ditches and disposing the sediment  
5 elsewhere on the Property. (*Id.*) Accepting these allegations as true, PLC's use of  
6 contaminated water to irrigate the Property, and removing sediment containing  
7 hazardous substances and placing them on the Property, are not akin to the passive  
8 soil migration presented in *Carson Harbor*. Passive migration here would be akin to PLC  
9 allowing contaminated creek water to migrate onto the Property along Bryant Creek  
10 without taking any action. However, here, PLC actively using polluted creek water for  
11 flood irrigation and disturbed contaminated sediment as alleged in the third-party  
12 complaint. Accordingly, PLC's flood irrigation activities and maintenance of the irrigation  
13 ditches cannot be considered passive migration of contaminants.

14 PLC also relies on *Coppola v. Smith (Coppola I)*, 935 F. Supp. 2d 993 (E.D. Cal.  
15 2013), to assert that disposal requires an "affirmative act of discarding" hazardous  
16 waste. (ECF No. 182 13-14.) In *Coppola I*, the plaintiff argued that the defendant water  
17 company should be a PRP because its past ownership and operation of an abandoned  
18 well exacerbated a contamination plume. *Coppola I*, 935 F. Supp. 2d at 1021-22. The  
19 court held that the plaintiff's allegations were insufficient to constitute disposal because  
20 the complaint did not allege an "affirmative act of discarding," but the court granted  
21 leave for the plaintiff to amend. *Id.* at 1023-24. In *Coppola v. Smith (Coppola II)*, 19 F.  
22 Supp. 3d 960 (E.D. Cal. 2014), the court found that the allegations that the water  
23 company's operation caused contaminants to be "deposited" or "leaked" into deeper  
24 groundwater zones were sufficient to allege that a "disposal" had occurred at the well.  
25 *Id.* at 973. Similarly here, ARCO alleges that PLC "deposited" contaminants on the  
26 Property.

27 PLC cites to *3550 Stevens Creek Associates v. Barclays Bank of Cal.*, 915 F.2d  
28 1355 (9th Cir. 1990), to argue that "disposal" must involve allegations of "an affirmative

1 act of discarding a substance as waste” and that “the act of irrigating a pasture is not  
2 discarding.” (ECF No. 182 at 13.) PLC’s argument is unpersuasive. First, as discussed,  
3 “disposal” as defined under CERCLA covers “discharge, deposit, injection, dumping,  
4 spilling, leaking or placing.” 42 U.S.C. § 9607(a). Moreover, PLC’s analogy  
5 misconstrues the holding in *3350 Stevens Creek*. That case involved recovery of  
6 response costs for clean-up of asbestos installed in a commercial building. 915 F.2d at  
7 1356. The court found that CERCLA’s definition of “disposal” pertains to ‘solid waste or  
8 hazardous waste,’ not to building materials [such as asbestos materials installed in  
9 building structure] which are neither.” *Id.* at 1361.

10 PLC relies on CERCLA’s exclusion of certain activities with recognized beneficial  
11 use to argue that flood irrigation, like these exempt activities, was conducted for  
12 legitimate reasons. (ECF No. 182 at 14-15.) This argument is similarly tenuous. Exempt  
13 activities, such as the application of fertilizer, or irrigation return flow, either require or  
14 involve the use of materials containing hazardous substance. Irrigation in and of itself  
15 does not require or involve the use of water containing hazardous substances.

16 Finally, PLC argues that irrigation using water rights from Bryant Creek is  
17 permitted under the Alpine Decree and therefore cannot amount to “an affirmative act of  
18 discarding.” (ECF No. 182 at 13.) Applying this logic would contravene the “broad  
19 interpretation” to be given to CERCLA in general and the expansive interpretation to be  
20 given to the definition of “disposal” in particular. Indeed, there are legitimate activities  
21 that have been found to amount to “disposal.” For example, the excavation of soil in  
22 *Kaiser Aluminum* was also an activity otherwise permitted. The Ninth Circuit found that  
23 the excavation of contaminated soil, moving it away from the excavation site and  
24 spreading it over untainted portions of the property for purposes of housing  
25 development amounted to “disposal” under CERCLA. *Kaiser Aluminum*, 976 F.2d at  
26 1342. Indeed, ARCO does not merely allege that PLC utilized Alpine Decree rights, but  
27 that PLC “determined if, when, where and how much water containing hazardous  
28 substances was placed and deposited on the Diamond X Property.” (ECF No. 179 at

21.)

“Disposal” has been interpreted broadly to include activities beyond the introduction of hazardous waste onto property. *Kaiser Aluminum*, 976 F.2d at 1342. Applying this broad interpretation here, the Court finds that ARCO has alleged sufficient facts to satisfy CERCLA’s definition of “disposal.”

## VI. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion or reconsideration as they do not affect the outcome of the Motions to Dismiss.

It is therefore ordered that Diamond X’s motion to dismiss (ECF No. 144) is denied.

It is further ordered that Park Livestock’s motion to dismiss (ECF No. 182) is denied.

DATED THIS 26<sup>th</sup> day of August 2016.



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MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE